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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 405

ROBERT L. BARBEE, PETITIONER

v.

CAPITAL AIRLINES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of Robert L. Barbee, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above case on August 2, 1951.

OPINIONS BELOW

The summary judgment of the District Court for the District of Columbia (R. 23) was not accompanied by an opinion. The opinion of the Court of Appeals (R. 25-30) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1951 (R. 31). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a veteran who entered the armed forces at a time when he was laid off or furloughed due to a reduction in force is entitled to reemployment benefits under the Selective Training and Service Act of 1940, as amended, where the applicable collective bargaining agreement provides that employees thus laid off shall be restored to employment in order of seniority and with the seniority which they had at the time of lay-off.

STATUTE AND CONTRACT INVOLVED

Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 890, as amended, 50 U.S.C. App. 308, is set forth in full, *infra,* Appendix A. The immediately pertinent provisions of Section 8(b) are as follows:

> In the case of any person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer * * *
>
> * * * * *
>
> (B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;
>
> * * * * *

The pertinent provisions of the collective bargaining agreement between respondent and the Airline Pilots' Association are set forth, *infra*, Appendix B.

STATEMENT

This is an action to enforce a veteran's reemployment rights under Section 8 of the Selective Training and Service Act of 1940, as amended.[1] Petitioner was first employed as a probationary copilot by the respondent Capital Airlines, Inc., on July 15, 1946. On January 6, 1947, petitioner was laid off or furloughed from his employment (R. 8, 16) in accordance with the respondent's letter of January 2, 1947, addressed to the petitioner, advising him as follows (R. 21):

> It is with regret that I must inform you that due to your position on the seniority system of the company, it is necessary to place you on furlough until further notice. This furlough will take effect as of January 6, 1947. * * * I take this action with great reluctance and hope that you will keep in touch with us so that you may be put back on our payrolls as soon as business permits.

On March 19, about 10 weeks later, and while petitioner was still idle, he entered the United States Air Force (R. 16). Petitioner was discharged from the Air Force on February 6, 1950, and re-

[1] In accordance with the provisions of Section 8(e) of the Act, set forth in Appendix A, petitioner was represented in the courts below by the United States Attorney for the District of Columbia.

quested the respondent to reinstate him in his former position. Upon respondent's refusal to reinstate him, petitioner brought this action. For relief, petitioner sought a judgment requiring respondent to reinstate him in his former position with the same relative position on the seniority roster which he held at the time of his entry into military service, and awarding him back pay from the date of his application for reinstatement. (R. 12.)

The respondent conceded (R. 8, 19) and the District Judge found (R. 16) that petitioner was "released" due to a reduction in respondent's working force in accordance with Section 27(a) of the collective bargaining agreement between respondent and its pilot employees. At all relevant times, Section 27(a) (R. 11)[2] provided that:

> A pilot who is released from the service of the Company due to reduction in force and who is subsequently reemployed shall retain his seniority to the time of release but shall not continue to accrue seniority after release unless and until he is reemployed. Such pilot, if he keeps the Company advised of his address, will be reemployed in the order of his seniority, provided the Company finds his flying ability and physical condition still meet the required standards. The right of preference in reem-

[2] The findings of fact and the arguments of both parties referred to Section 27(a) of the agreement as alone controlling. However, Section 18(b) (*infra*, pp. 18-19) is also pertinent in that it enumerates the incidents of the employment which are governed by seniority.

> ployment shall expire at the end of one year from the date of release.

While petitioner was serving in the Air Force, the respondent twice called him back to work (R. 21), presumably in accordance with his seniority. The first recall occurred in May 1947, about five months after his lay-off and well within the one year specified in Section 27(a) of the collective bargaining agreement, and the second in May 1948 (R. 21).

So much appeared from the pleadings and affidavits, and upon that basis the district court, after denying petitioner's motion for a temporary injunction (R. 15-16), granted summary judgment for the respondent (R. 23). On appeal, the court below held, with Judge Washington dissenting, (1) that petitioner had been "permanently released" from respondent's service before he was recalled to the Air Force, and (2) "that the status of a pilot released due to a reduction in force under Section 27(a) of the collective bargaining agreement is one of unemployment," and that upon either basis, therefore, petitioner did not leave a position of employment in order to perform military service and was not entitled to be reinstated as a copilot in respondent's service (R. 28-29).[3] Accordingly, it affirmed the judgment.

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[3] Respondent also contended in the court below that petitioner, having been hired in a one-year probationary status in July, 1946, was only a temporary employee not entitled to the benefits of the Act. The court made no reference in its opinion to this contention, and we believe that it is clearly

REASONS FOR GRANTING THE WRIT

This case presents the important question of whether Section 8 of the Selective Training and Service Act of 1940 accords reemployment rights to veterans who entered the armed services at a time when they were laid off or furloughed, due to a reduction in force, pursuant to a collective bargaining agreement providing that both lay-offs and reemployment (with restoration of seniority accrued to the date of lay-off) should be governed by seniority. Such seniority provisions appear in a large number of collective bargaining agreements. The question has great future importance in that it appears that many persons will be inducted into the armed forces while they are furloughed from their employment because of temporary reductions in force incident to retooling for rearmament. Section 9 of the Selective Service Act of 1948[4] prescribes substantially the same reemployment rights for veterans as does Section 8 of the 1940 Act.

1. The initial conclusion of the court below that petitioner was permanently discharged from the respondent's service, as had been the plaintiffs in *Edwards and Young* v. *Capital Airlines, Inc.*, 176 F. 2d 755 (C.A. D.C.), is obviously erroneous.

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incorrect, since the seniority provisions of the collective bargaining agreement are applicable to probationary copilots. Also, it is our view that a probationary employee is not included in the class of temporary employees who are denied reemployment rights by Section 8(b) of the Act.

[4] 62 Stat. 604, 614.

As Judge Washington, dissenting, pointed out (R. 30), Edwards and Young were in fact permanently discharged from the respondent's service, while the petitioner was told that he was being furloughed in accordance with seniority and was in fact offered reemployment in accordance with seniority (*supra*, p. 5). The respondent has conceded (R. 19) and the district court found (R. 16) that petitioner was released in accordance with Section 27(a) of the collective bargaining agreement. Indeed, the court below stated that, "There is no dispute that the [petitioner] was released or furloughed pursuant to Section 27(a) of the collective bargaining agreement in the instant case" (R. 28). Under these circumstances, we believe that the indispensable basis of the decision below was the conclusion of the Court of Appeals that an employee who enters the armed services at a time when he is laid off or furloughed pursuant to Section 27(a) lacks a position of *employment* to which he is to be restored in accordance with Section 8 of the Act.[5]

2. Accordingly, the core of the decision is that since an employee furloughed or laid off pursuant to Section 27(a) is not at that point performing

[5] Our conclusion as to the essential basis of the decision below is confirmed by the fact that if that decision was based upon a resolution of the disputed factual issue of whether the petitioner was "discharged" or "furloughed", then the disposition of that issue by granting a motion for summary judgment was clearly erroneous. Rule 56, Federal Rules of Civil Procedure.

work for the employer and being paid by the employer, such an employee is unemployed; and, if he is thus unemployed when he enters the armed forces, he does not have a position of employment to which he must be restored under Section 8 of the Act. This result ignores the fact that, under a large number of collective bargaining agreements, seniority provisions governing layoff and reemployment in connection with temporary reductions in force confer upon furloughed employees an expectation of being put back to work in accordance with their seniority rights. We contend that such a contractual right and expectation of restoration to employment constitutes a continuing relationship between the furloughed employee and his employer which is protected by Section 8 of the Selective Training and Service Act. Specifically, we urge that under Section 8 petitioner is entitled to be reinstated in the position of copilot to which he would have been restored in accordance with Section 27(a) of the agreement if he had not entered the armed forces.

Section 18(b) of the instant collective bargaining agreement typically provides (R. 10) that:

> Seniority shall govern all pilots in case of promotion and demotion, their choice of vacancies, filling of vacancies, their assignment or reassignment due to expansion or reduction in schedules, their retention in case of reduction in force, their reemployment after

> release due to reduction in force provided that the pilot's qualifications are sufficient for the operation to which he is to be assigned. * * *

Section 27(a) provides that a pilot who is released due to reduction in force and who is later reemployed shall retain the seniority which he has accrued to the time of his release; it further provides that such a pilot "will be reemployed in the order of his seniority," but that, "The right of prefe. nce in reemployment shall expire at the end of one year from the date of release." Thus, an employee released or furloughed in accordance with Section 27(a) retains for one year (1) a right to preference in reemployment in accordance with seniority, and (2) a right when reemployed to retain the seniority which he had accrued at the time of his release, with its valuable incidents under Section 18(b) of the agreement.

Similar provisions are found in many collective bargaining agreements, with variations as to the extent to which seniority accrues during layoff and as to the duration of the right of preference in reemployment. For example, the current agreement between General Motors Corporation and the United Automobile, Aircraft & Agricultura. Implement Workers of America—CIO provides that "Employees will be laid off and rehired in accordance with local seniority agreements"; under this agreement a laid-off employee retains his seniority

for a period equal to the seniority which he had acquired at the time of such lay-off".

Clearly, this preferential right to reemployment in accordance with seniority, together with the companion provision for reduction in force according to seniority, is a most important aspect of the seniority system. It creates between the furloughed employee and his employer a relationship, in terms of an expectation of reemployment, which must be regarded as a "position * * * in the employ" of such employer so as to effectuate the statutory purpose "to protect the veteran's rights under [seniority] systems and to protect him against loss under them by reason of his absence." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 288.[7]

The practical consequences of the decision below are persuasive that it is erroneous. Every year, many thousands of employees covered by such seniority provisions are laid off or furloughed in reduction in force caused by seasonal or other fluctuations in business, retooling, lack of materials, damage to plant from fire or flood, taking

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[6] See, generally, *Union Agreement Provisions*, Bureau of Labor Statistics, Department of Labor, H. Doc. No. 723, 77th Cong., 2d Sess., chs. 8, 14; *Collective Bargaining Provisions, Seniority* (1949), Bureau of Labor Statistics, Department of Labor Bulletin 908-11, pp. 50-57.

[7] These express contractual rights present no such difficulties of ascertainment as were involved in the "continuing right to and customary tenure, term or condition of employment" which was protected in *N. L. R. B.* v. *Waterman S. S. Co.*, 309 U. S. 206, 213.

inventory, and similar circumstances interrupting the employer's operations. Inevitably, many of such employees will be inducted into the armed forces at a time when they are thus laid off or furloughed. The result of the decision below is that no veteran who has entered or enters the armed forces under these circumstances will be entitled to be restored to his employment in accordance with Section 8 of the Act.

The decision below is also in square conflict with the rationale of this Court in *Fishgold* v. *Sullivan Drydock & Repair*, 328 U.S. 275. In that case it was held that veterans restored to their positions properly may be laid off when a work shortage requires it, in accordance with a seniority system, and that such a veteran was not "discharged from his position" within the meaning of Section 8 of the Act. In arriving at this conclusion, the Court made the following distinction between "discharge", and "furlough" or "layoff" (328 U.S. at 286-288):

> Discharge normally means termination of the employment relationship or loss of a position. In common parlance and in industrial parlance a person who has been laid off by operation of a seniority system and put on a waiting list for reassignment would hardly be considered as having been "discharged." * * * A furlough is not considered a discharge. It is a form of lay-off. So is a leave of absence. And whether either results from

> unilateral action by the employer or otherwise, consequences are quite different from termination of the employment relationship. * * * An employee on furlough or on leave of absence has a continuing relationship with the employer; he retains a right to be restored to work under specified conditions. * * *
>
> The "position" to which the veteran is restored is the "position" which he left plus cumulated seniority. Certainly he would not have been discharged from such position and unable to get it back, if at the time of his induction into the armed services he had been laid off by operation of a seniority system. Plainly he still had his "position" when he was inducted. * * *

The decision below, therefore, is clearly inconsistent with this Court's opinion in *Fishgold*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

OCTOBER 1951.

APPENDIX A

Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 890, as amended, 50 U.S.C. App. 308, reads as follows:

> (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. In addition, each such person who is inducted into the land or naval forces under this Act for training and service shall be given a physical examination at the beginning of such training and service; and upon the completion of his period of training and service under section 3 (b), each such person shall be given another physical examination and, upon the written request of the person concerned, shall be given a statement of medical record by the War Department: *Provided,* That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary of War or the Secretary of the Navy would prove injurious to the physical or mental health of the person to whom it pertains.
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any em-

ployer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so

restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(d) Section 3 (c) of the joint resolution entitled "Joint Resolution to strengthen the common defense and to authorize the President to order members and units of reserve components and retired personnel of the Regular Army into active military service", approved August 27, 1940, is amended to read as follows:

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was ordered into such service, and shall not be discharged from such position without cause within one year after such restoration."

(e) In case any private employer fails or refuses to comply with the provisions of sub-

section (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided,* That no fees or court costs shall be taxed against the person so applying for such benefits.

(f) Section 3 (d) of the joint resolution entitled "Joint Resolution to strengthen the common defense and to authorize the President to order members and units of reserve components and retired personnel of the Regular Army into active military service",

approved August 27, 1940, is amended by inserting before the period at the end of the first sentence the following: ", and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action".

(g) The Director of Selective Service herein provided for shall establish a Personnel Division with adequate facilities to render aid in the replacement in their former positions of, or in securing positions for, members of the reserve components of the land and naval forces of the United States who have satisfactorily completed any period of active duty, and persons who have satisfactorily completed any period of their training and service under this Act.

(h) Any person inducted into the land or naval forces for training and service under this Act shall, during the period of such training and service, be permitted to vote in person or by absentee ballot in any general, special or primary election occurring in the State of which he is a resident, whether he is within or outside of such State at the time of such election, if under the laws of such State he is entitled so to vote in such election; but nothing in this subsection shall be construed to require granting to any such person a leave of absence for longer than one day in order to permit him to vote in person in any such election.

(i) It is the expressed policy of the Congress that whenever a vacancy is caused in the employment rolls of any business or industry by reason of induction into the service of the

United States of an employee pursuant to the provisions of this Act such vacancy shall not be filled by any person who is a member of the Communist Party or the German-American Bund.

APPENDIX B

The pertinent provisions of the collective bargaining agreement between respondent and the Airline Pilots' Association are as follows (R. 9-12):

Sec. 2. As used in this agreement:

(a) "Pilot" shall include and mean first pilot, reserve pilot and copilots as defined herein:

* * * * *

Sec. 18. (a) Seniority of a pilot shall be based upon the length of service as a regularly scheduled air line pilot in the employ of the Company or its predecessor airline Companies whose operations have been taken over by the Company. Seniority grievance cases which are now pending or may become pending when a master seniority list is posted as provided herein, shall be decided by the Seniority Adjustment Board established in this agreement, the decision of which shall be final and binding on all parties hereto.

(b) Seniority shall govern all pilots in case of promotion and demotion, their choice of vacancies, filling of vacancies, their assignment or reassignment due to expansion or

reduction in schedules, their retention in case of reduction in force, their reemployment after release due to reduction in force provided that the pilot's qualifications are sufficient for the operation to which he is to be assigned. In the event that a pilot is considered by the Company not to be sufficiently qualified, the Company shall immediately furnish such pilot written reasons therefor.

(c) Seniority as a pilot shall begin to accrue on the date of assignment to air line flying duty as a pilot, and shall continue to accrue throughout the period of such duty except as otherwise provided in this agreement.

* * * * *

Sec. 20. Copilots may be on probation for a period not to exceed the first twelve months of their service as a copilot with the Company. * * *

* * * * *

Sec. 27. (a) A pilot who is released from the service of the Company due to reduction in force and who is subsequently reemployed shall retain his seniority to the time of release but shall not continue to accrue seniority after release unless and until he is reemployed. Such pilot, if he keeps the Company advised of his address, will be reemployed in the order of his seniority, provided the Company finds his flying ability and physical condition still meet the required standards. The right of preference in reemployment shall expire at the end of one year from the date of release.

(b) A pilot who has been released due to reduction of force shall file his address with the Company and shall thereafter promptly advise the Company of any change in address and shall renew his statement of address, whether changed or not, each ninety days.

(c) A pilot shall not be entitled to preference in reemployment if he does not comply with the foregoing requirement or if he does not return to the service of the Company within two weeks after notice to do so, sent by registered mail or telegram to the last address filed with the Company.

Sec. 28.

A. Hearing. 1. A pilot shall not be disciplined or dismissed from the Company without notification in writing from the Company as to any such action and such pilot shall not be disciplined or dismissed without an investigation and hearing provided that the pilot makes written request for an investigation and hearing within twelve days after receiving such written notification. Nothing herein shall extend the right of investigation and hearing to a copilot on probationary status.

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No. 405

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

ROBERT L. BARBEE, *Petitioner,*

v.

CAPITAL AIRLINES, INC., *Respondent.*

Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 405

ROBERT L. BARBEE, *Petitioner,*

v.

CAPITAL AIRLINES, INC., *Respondent.*

Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Capital Airlines, Inc.[1] hereby opposes the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on August 2, 1951.

OPINIONS BELOW.

The summary judgment of the District Court for the District of Columbia (R. 23) was not accompanied by an opin-

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[1] Capital Airlines, Inc. will be referred to as "Capital" or "Capital Airlines."

ion. The opinion of the Court of Appeals sustaining the decision of the District Court (R. 25-30) is reported at 191 F. 2d 507.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 2, 1951 (R. 31). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Whether the Court of Appeals properly ruled (R. 28) that the petitioner "did not leave a position of employment in order to perform military service" and therefore was not entitled to reemployment benefits under the Selective Training and Service Act of 1940, as amended.

2. Whether the ruling of the Court of Appeals is in conflict with this Court's decision in *Fishgold* v. *Sullivan Drydock & Repair,* 328 U. S. 275.

STATUTE AND CONTRACT INVOLVED.

The pertinent portions of the statute involved and the pertinent provisions of the collective bargaining agreement between Capital and the Air Line Pilots Association are set forth at Appendix A and Appendix B of the Petition.

STATEMENT.

On July 15, 1946, petitioner Barbee was first employed as a probationary co-pilot by respondent Capital Airlines (R. 8, 16). On January 6, 1947, after less than six months' employment, petitioner was released from the service of Capital Airlines due to a reduction in force in conformity with the provisions of section 27 (a) of the collective bargaining agreement between Capital and its pilot employees (R. 8, 16). Furthermore, Capital advised petitioner that the date of any possible recall to Capital was indefinite (R. 8). It

is undisputed in this proceeding that petitioner was released from the service of Capital under section 27 (a) of the labor agreement (R. 28 and Petition, p. 4).

On March 19, 1947, two and one-half months after his release by Capital, petitioner entered the United States Air Force. While in the Air Force, petitioner attempted to gain permanent status therein by applying for a regular commission. Unsuccessful in this attempt, he was discharged from the Air Force on February 6, 1950, after nearly three years of service. (R. 8, 16).

Petitioner on February 8, 1950, applied to Capital to be reemployed in his former position as a co-pilot, requesting that he be accorded the same seniority standing he had previously held at the time of his release from the service of Capital on January 6, 1947 (R. 12). In other words, petitioner claims that he should have been permitted to accrue seniority with Capital during the entire time that he was serving with the Air Force. Capital refused and has continued to refuse to reemploy petitioner at this advanced seniority status on the ground that he is not so entitled, either by the provisions of Capital's labor agreement with the pilots or by any veteran's privileges accorded by the Selective Training and Service Act of 1940 as amended.

Upon Capital's refusal to rehire petitioner at this advanced seniority rating, petitioner filed the present action, seeking to compel Capital to reemploy him with the full seniority to which petitioner claims he is entitled (R. 7). Pending the disposition of his suit, petitioner moved the trial court for a preliminary injunction ordering Capital to rehire petitioner as a co-pilot with seniority as of the date of the preliminary injunction (R. 7). Capital opposed that motion, and after submission of affidavits and opposing points and authorities by both parties, a hearing on the motion was held before the trial court on June 27, 1950 (R. 1). Thereupon, the trial court issued an order finding, among other things, that petitioner had not left the service

of Capital to enter the armed services, and was therefore not entitled to reemployment pursuant to the Selective Training and Service Act. The trial court further found that petitioner would suffer no irreparable injury through denial of the motion. Accordingly, petitioner's motion for a preliminary injunction pending trial was denied (R. 16). Capital then filed its answer (R. 14).

Thereafter, Capital filed a motion for summary judgment on its behalf (R. 19). In support of its motion for summary judgment, Capital Airlines urged, among other things, that since petitioner had been released from Capital's employment pursuant to section 27(a) of the collective bargaining agreement, petitioner had no reemployment rights under the Selective Training and Service Act (R. 5). The Court of Appeals for the District of Columbia had expressly so held, with respect to the same section of the same agreement, in *Edwards and Young* v. *Capital Airlines, Inc.*, 176 F. 2d 755, Cert. denied 338 U. S. 885. The trial court found "that there is no genuine issue as to any material fact and that the defendant Capital Airlines, Inc. is entitled to a judgment as a matter of law, upon the basis of *Edwards and Young* v. *Capital Airlines Inc.*, 84 App. D. C. 346, 176 F. 2d 755." (R. 23).

On appeal, the court below held "that the status of a pilot released due to a reduction in force under Section 27(a) of the collective bargaining agreement is one of unemployment" and "since the appellant (petitioner here) did not leave a position of employment to perform military service," he has no reemployment rights under the Selective Training and Service Act of 1940 as amended (R. 28-29). Accordingly, the judgment of the trial court was affirmed.

REASONS FOR THE DENIAL OF THE PETITION FOR CERTIORARI.

A. The Case is Limited to Its Particular Facts. It Does Not Present an Important Question of General Application.

The opinion below resolves the narrow question of the legal status of a pilot employee of Capital Airlines who has been released from employment under a specific provision of the collective bargaining agreement between Capital and its pilot employees. This collective bargaining agreement controls the employer-employee relationships of Capital and its pilot employees alone; it is not an agreement of general application. As a consequence, the limited holding of the court below as to these particular facts presents no question of general application which merits review by this Court.

Petitioner contends that certiorari should be granted in this case by the Court because there is presented the "question of whether Section 8 of the Selective Training and Service Act of 1940 accords reemployment rights to veterans who entered the armed services at a time when they were laid off or furloughed, due to a reduction in force . . ." (Petition, p. 6). This overamplification of the holding of the case, in an effort to secure a further review by this Court, is not in accord with the facts. The record is clear that the affirming opinion of the Court of Appeals is limited to the peculiar facts present in petitioner's case as controlled by the specific provisions of the applicable collective bargaining agreement. Contrary to the allegations of petitioner (Petition, p. 6), the opinion affects no person except those employees of Capital Airlines who may possibly be involved in the same factual situation. It is clear, therefore, that the decision below does not present any question of broad significance and is narrowly confined to special and peculiar facts.

In order for a returning veteran to be entitled to reemployment benefits under the Selective Training and Serv-

ice Act, it is mandatory that the employee shall have left a position of employment in order to perform military service. 50 U. S. C. App. 308. Petitioner's status with Capital became one of *unemployment* when he was released from Capital's service on January 6, 1947. When he entered the armed services two and one-half months later, on March 19, 1947, petitioner did *not* leave a "position in the employ" of Capital "in order to perform such training and service." Consequently, the court below properly held that petitioner has no standing to invoke the aid of the Act in securing reemployment with Capital.

The collective bargaining agreement between Capital and its pilot employees provides, among other things:

> "Sec. 27(a) A pilot who is *released* from the service of the Company due to a reduction in force and who is subsequently *reemployed* shall retain his seniority to the time of release but shall not continue to accrue seniority after release unless and until he is *reemployed*. Such pilot, if he keeps the Company advised of his address, will be *reemployed* in the order of his seniority, provided the Company finds his flying ability and physical condition still meet the required standards. The right of preference in *reemployment* shall expire at the end of one year from the date of *release*." (Emphasis added) (R. 11)

It was under this section 27(a) of the contract that petitioner was released from Capital's service on January 6, 1947 (R. 28 and Petition, p. 4).

Prior to the instant case, the Court of Appeals for the District of Columbia, in considering the effect of the same section 27(a) of the agreement, had held as a matter of law that a pilot employee released under this section does not continue in the employment of the company and therefore has no reemployment rights under the Selective Training and Service Act. *Edwards and Young* v. *Capital Airlines, Inc.*, 176 F. 2d 755, Cert. denied 338 U. S. 885. As the Court of Appeals said:

> "This Section 27(a) refers to a retention of seniority and to preference in return to the employee's service. *But, plainly, it contemplates that during the period of release from that service, the employee does not continue in the employment of the company.* The section speaks of 'reemployment.' While it speak of retaining seniority, it actually provides for a reinstatement of seniority upon reemployment. It contemplates that a pilot released due to a reduction in force might never be reemployed. Only if and when he is reemployed does he resume his seniority status. * * *
>
> "We are of the view, as we have said, that *the status of one released due to reduction in force is fixed by Section 27(a) of the contract as one of unemployment.*" (176 F. 2d at 758) (Emphasis added)

Accordingly, the court ruled that:

> "They (appellants) did not leave their employment 'in order to perform such training and service.' It is our view therefore, that the above-quoted provisions of the Selective Training and Service Act did not apply to these appellants and so the company was not required by that statute to restore them to their prior seniority status." (176 F. 2d at 757)

Similarly, petitioner was not in Capital's employ when he entered the Air Force. Therefore, the court below properly ruled that section 8 of the Selective Training and Service Act does not apply to petitioner and Capital is not required by statute to restore him to his former seniority status with the company. Petitioner's contention to the contrary (Petition p. 6) is not correct.

Petitioner incorrectly assumes that the decision will affect innumerable employees in other companies (Petition, pp. 6, 9, and 10). The ruling of the court below is specifically confined to the legal effect of a provision of Capital's own collective bargaining agreement with its pilots. The court held that the status of a pilot released from the service of Capital under section 27(a) of the labor agreement was one of unemployment (R. 28). Peti-

tioner's attempt to generalize the effect of the court's limited holding (Petition, pp. 6, 8, 9 and 10), and thereby to influence this Court in granting certiorari, is not supported by the opinion of the court below.

In furtherance of his efforts to gain a review, petitioner attempts to create the impression that the ruling of the court below will affect the rights of certain employees of the General Motors Corporation (Petition, p. 9). Such a suggestion is incorrect. It completely ignores the distinguishing features between section 27(a) of Capital's contract and the single sentence from the contract of General Motors which petitioner has quoted (Petition, p. 9). Section 27(a) of Capital's agreement repeatedly speaks in terms of "release" and possible "reemployment." The quoted sentence from the contract of General Motors merely states that "Employees will be laid off and rehired in accordance with local seniority agreement." Petitioner does not quote further from the General Motors contract, but states with unsupported generality that "under this agreement a laid-off employee retains his seniority" for a designated period of time (Petition, pp. 9, 10). Obviously, the nature of "local seniority agreements" (within the meaning of the quoted sentence) varies among the different plants of General Motors. Just as obviously, the unsupported conclusion stated by the petitioner does not express anything akin to the precise language of Capital's collective bargaining agreement.

To contend that the ruling of the court below controls the interpretation of the General Motors agreement is patently absurd. Only Capital's pilot employees are governed by the provisions of section 27(a). Petitioner's allegation that "many thousands of employees (are) covered by such seniority provisions" has nothing to support it. (Petition, p. 10).

B. The Decision Below is Not in Conflict With Any Decision of This Court.

The ruling below is consistent with the decisions of this Court. This Court has held that determinations affecting the employment rights of veterans must be consistent with and be guided by the collective bargaining process. *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521. The court below has expressly followed this principle.

In the *Aeronautical Lodge* case, *supra*, this Court said:

> "In providing that a veteran shall be restored to the position he had before he entered the military service 'without loss of seniority', § 8 of the Act uses the term 'seniority' without definition. It is thus apparent that Congress was not creating a system of seniority but recognizing its operation as part of the process of collective bargaining. *We must therefore look to the conventional uses of the seniority system in the process of collective bargaining in order to determine the rights of seniority which the Selective Service Act guaranteed the veteran.*" (337 U. S. at 525)

In a like manner, in providing reemployment rights only when a person leaves "a position in the employ" of an employer, the Act uses the term "position in the employ" without definition. Here, just as in defining seniority, the courts "must look to the conventional uses in the process of collective bargaining." In the present case this can lead only to section 27(a) of the collective bargaining agreement between Capital and its pilots.

The court below, following the direction of this Court, looked to the applicable collective bargaining agreement and determined that under section 27(a) thereof petitioner did not have the status of a Capital employee upon his entry into the armed services. As a consequence, the court ruled that petitioner has no reemployment rights under the Selective Training and Service Act. This reasoning of the court below is entirely consistent with the principles expressed by this Court.

Contrary to the allegation of petitioner (Petition, p. 11), the decision below is *not* in "conflict with the rationale of the Court in *Fishgold* v. *Sullivan Drydock & Repair*, 328 U. S. 275." In that case, Fishgold had been reemployed after his return from military service. Within a year of his reemployment, it became necessary to furlough him from his work for a 9-day period because of a decrease in work of the shipyard. Non-veterans with higher seniority were not furloughed. Fishgold contended that this lay-off was a discharge within one year in violation of the Selective Training and Service Act. This Court ruled that under the particular union contract involved, Fishgold had not been discharged in violation of the Act. Instead, he had been furloughed and therefore still retained his position with the company. There is nothing inconsistent with this Court's ruling in the *Fishgold* case and the decision of the court below.

Capital has never contended that a person on furlough does not occupy a position in the employ of a company. Rather it has been the position of Capital that petitioner herein was *not* on furlough from Capital at the time of his entry into the Air Force. The Court of Appeals in the *Edwards* case, *supra*, and the court below both ruled that a person released from Captial's service under section 27(a) of the contract is no longer in a position of employment with the company. The Court of Appeals considered the effect of the *Fishgold* case in reaching its decision in the *Edwards* case. It found the two cases compatible but distinguishable (176 F. 2d at 757). The court held as a matter of law that a pilot employee released under section 27(a) of the contract is *not* on furlough within the meaning of the *Fishgold* case. The court below followed this distinction. Therefore, the *Fishgold* case is not applicable here.

In no way does the narrow holding of the court below merit review in this Court. The decision, affecting only those pilot employees of Capital similarly placed, is confined to the legal effect of a specific provision of a specific

contract. The opinion presents no question of broad significance and is entirely consistent with prior decisions of this Court.

CONCLUSION.

For the foregoing reason, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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